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Date of Decision: 18th January 1996

CRIMINAL APPEAL NO. 392 OF 1989
with
CRIMINAL APPEAL NO. 463 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circula...

Civil Judge? No

Shri P.M. Raval, Senior Advocate, with Shri H.P. Raval, Advocate, for the Appellants in Criminal Appeal No. 392 of 1989

Shri R.M. Agrawal, Advocate, for the Appellant in Criminal Appeal No. 463 of 1989

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent in both appeals

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CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.

(Date: 18th January 1996)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Mehsana on 8th June 1989 in Sessions Case No. 172 of 1988 is under challenge in both these appeals. Thereby the appellants in Criminal Appeal No. 392 of 1989 (original accused Nos. 2 to 4) were convicted of the offences punishable under section 29 read with sections 8 and 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief) and the appellant in Criminal Appeal No. 463 of 1989 (original accused No. 1) of the offence punishable under section 8 read with sec. 18 thereof and all of them were sentenced to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default simple imprisonment for one year. Since both these appeals arise from the very same judgment and order of conviction and sentence and since common questions of law and fact are found arising in both of them, we have thought it fit to dispose of both these appeals by this common judgment of ours.

2. It is not necessary to set out in detail the facts giving rise to these appeals. It may be sufficient to note that, on receipt of prior information while they were present at the town-hall, one Police Sub-Inspector attached to the City Police Station at Kalol, named, Kalubhai Arjanbhai Odedara, in the company of certain other police officers and officials raided the house of accused No.1 and found some 4 Kgs. of opium during the said raid. Accused Nos. 2, 3 and 4 were also found sitting in the house of accused No. 1 at the relevant time. Thereupon the opium was seized and all the accused were apprehended. The concerned Police Sub-Inspector thereafter lodged his complaint charging the accused with the offences punishable under sections 66A, 65E and 81 of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief). On completion of the investigation, the necessary charge-sheet was submitted in the court of the learned Judicial Magistrate (First Class) at Kalol charging all the accused with the aforesaid offences punishable under the Prohibition Act. It appears that, at the instance of the prosecutor appearing in the case, the learned trial Magistrate thought that the act on the part of the accused also involved offences punishable under the NDPS Act. The learned trial Magistrate was not competent to try the case in respect of the offence punishable thereunder. The case was therefore committed to the Sessions Court at Mehsana for trial and disposal. It came to be registered as Sessions Case No. 172 of 1988. The case appears to have been assigned to the learned Additional Sessions Judge for trial and disposal. The charge against the accused was framed on 15th February 1989. All of them were charged with the offences punishable under sections 8, 20, 21 and 29 of the NDPS Act and sections 65E, 66A

and 81 of the Prohibition Act. No accused pleaded guilty to the charge. All of them were thereupon tried. After recording the prosecution evidence and after recording the further statement of each accused under sec. 313 of the Code of Criminal Procedure, 1973 and after hearing rival submissions, by his judgment and order passed on 8th June 1989 in the aforesaid Sessions Case, the learned trial Judge convicted accused No.1 of the offence punishable under sec. 8 read with sec. 18 of the NDPS Act and accused Nos. 2, 3 and 4 with the offence punishable under sec. 29 read with sections 8 and 18 thereof and sentenced all of them to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default simple imprisonment for one year. It may be mentioned that the learned trial Judge found all the accused guilty of the offences punishable under the Prohibition Act with which they were charged. However, in the opinion of the learned trial Judge, since the offence under the NDPS Act was graver in nature, it was not necessary to give a separate finding with respect to the offences punishable under the Prohibition Act and as such no order of conviction and sentence with respect to the offences punishable under the Prohibition Act was passed. The aggrieved accused have thereupon preferred these two separate appeals before this court for questioning the correctness of their respective conviction and sentence by the learned trial Judge.

3. These two appeals can be disposed of on two main grounds. In the first place, the muddamal article was seized on 1st September 1986 and it was sent to the forensic science laboratory for its analysis and report on 15th October 1986 as transpiring from the forwarding letter of 13th July 1987 from the Forensic Science Laboratory to the Police Sub-Inspector L.C.B. at Mehsana at Ex. 14 on the record of the case. There was thus delay of 45 days in sending the muddamal article to the forensic science laboratory for its analysis and report. Such delay of 45 days has not come to be explained by or on behalf of the prosecution in any manner.

4. In this connection a reference deserves to be made to the Division Bench ruling of this Court (in which one of us was a member) in Criminal Appeal No. 481 of 1992 decided on 23rd/24th November 1992. In that case, there was inter alia unexplained delay of nearly 8 weeks in sending the muddamal article to the forensic science laboratory for its analysis and report. That delay was considered to be fatal to the prosecution case. A similar view is taken by another Division Bench of this Court in Criminal Appeal No. 50 of 1988 decided on 22nd January 1992. In that case, the unexplained delay was to the tune of only 25 days. Such delay was also considered to be fatal to the prosecution case.

5. Both the aforesaid unreported Division Bench rulings of

this Court are on all fours applicable in the present case. The delay of 45 days in sending the muddamal sample to the forensic science laboratory for its analysis and report has not been explained in any manner by or on behalf of the prosecution at trial. In that view of the matter, the trial would stand vitiated on this ground alone.

6. The second ground on which the prosecution cannot succeed is non-comparison of the facsimile seal impression used for sealing the muddamal article when the sample was received by the forensic science laboratory. At Ex. 14 on the record of the case is the forwarding letter of 13th July 1987 addressed by and on behalf of the forensic science laboratory to the Police Sub-Inspector L.C.B. at Mehsana. In the relevant column regarding details with respect to the parcel qua the conditions in which it was received it has been mentioned "one sealed paper packet" (as translated). It does not mention the facsimile of the stamp impression. The author of the report accompanying the aforesaid forwarding letter has not been examined. There is nothing on record to show or to suggest that the facsimile of the sealed impression found on the sealed packet received by the forensic science laboratory was the same as it was appearing in the forwarding letter from the concerned police station with which the sealed packet was received. In absence of material showing such comparison of the facsimile seal impression, it becomes doubtful whether the sealed packet contained the sample of the very same muddamal which was found in possession of accused No. 1 sitting in the company of the remaining accused. It is a settled principle of criminal law that the benefit of doubt should always operate in favour of the accused.

7. In view of our aforesaid discussion, we are of the opinion that the prosecution has not been able to bring the guilt home to the accused or any of them beyond any reasonable doubt with respect to the offences with which they stood charged. The impugned judgment and order of conviction cannot therefore be sustained in law. It has to be quashed and set aside.

8. In the result, both these appeals are accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Mehsana on 8th June 1989 in Sessions Case No. 172 of 1988 with respect to all the appellants is quashed and set aside. We are told that accused No. 1 (the appellant in Criminal Appeal No. 463 of 1989 by the name Rajabhai Khumabhai Prajapati) is in jail serving his term of sentence as awarded by the learned trial Judge. He is ordered to be set at liberty if no longer required in any other case. The appellants in Criminal Appeal No. 392 of 1989 are on bail. Their bail bonds are ordered to be cancelled. The muddamal articles may be disposed of in terms of the direction

given by the learned trial Judge in his judgment and order.
